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In the Supreme Court of the United States

CENTRAL MAINE POWER COMPANY,
Petitioner

v.

MAINE PUBLIC UTILITIES COMMISSION

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Maine

BRIEF OF EDISON ELECTRIC INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

EDWARD H. COMER
LAURENCE W. BROWN
EDISON ELECTRIC INSTITUTE
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 508-5000

PETER BUSCEMI *
CASWELL O. HOBBS, III
STEPHEN PAUL MAHINKA
KATHLEEN M. SANZO
SANDRA J.P. DENNIS
JULIE E. KOCH
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190
* *Counsel of Record*

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the rules of Maine's Public Utility Commission, which permit the state (a) to control the content of educational speech by a utility company and (b) to require a utility to disseminate the state's own speech, violate the First Amendment.

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BRIEF OF EDISON ELECTRIC INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER[1]

INTEREST OF THE AMICUS CURIAE

The Edison Electric Institute ("EEI") is the national association of shareholder-owned electric companies, their industry associates, and their international affiliates. EEI provides a forum for the exchange of experience and ideas about the electric power industry and is involved on behalf of its members in the strategic issues shaping the industry in an era of rapid change. EEI's U.S. member electric companies produce and deliver approximately 75 percent of the electricity used in the United States.

EEI routinely publishes studies on various matters affecting electric companies. In recent years, many of these studies have involved the restructuring of the electricity industry and issues associated with restructuring. EEI has published monographs on cost recovery, advertising, name and logo restrictions, constitutional issues pertinent to state public utility regulations, and a variety of practical concerns regarding the implementation of industry restructuring. EEI also serves as a resource for companies in the electric power industry, holding educational conferences where industry members meet and interact. EEI has appeared before state legislatures and commissions on issues of broad precedential interest relating to electric utilities, especially those relating to the creation of a new competitive framework for the sale of electricity to retail customers.

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[1] This brief was prepared by Edison Electric Institute and its counsel. No party or its counsel contributed, monetarily or otherwise, to the preparation or submission of the brief. *See* Rule 37.6. In addition, in accordance with Rule 37.2(a), both parties have consented to Edison Electric Institute's filing of this brief, and their letters of consent have been submitted to the Clerk of this Court.

EEI, as an *amicus curiae* before this Court, seeks to assist this Court by presenting the considerable experience and perspective of its members, who are experts in the electric power industry and have either experienced or likely will experience restructuring in their respective states. EEI's member companies reside and do business in almost every state in the nation. EEI is in a unique position to inform the Court on these issues, having first-hand knowledge of the electricity business, its restructuring, and the advertising and marketing issues pertinent to newly restructured industries. EEI is involved in monitoring the status of and participating in restructuring proceedings in states across the country and evaluating the effects of various states' plans on utilities, consumers, and the marketplace. EEI's members are affected by these new laws and seek to assist in their development in each state.

The decision of the Supreme Judicial Court of Maine, if left undisturbed, could affect not just the dissemination of educational information to consumers in the State of Maine by Central Maine Power ("CMP") and other Maine utilities, but could establish a precedent affecting similar educational activities by electric utility companies in other states regarding plans for industry restructuring. In addition, the decision below, if allowed to stand, is likely to have an impact on the protection of core non-commercial speech in other highly-regulated industries and, indeed, in businesses generally.

REASONS FOR GRANTING THE PETITION

Review should be granted for three principal reasons. First, the court below has decided an important First Amendment question in a way that impermissibly burdens petitioner's core speech about a subject of enormous public significance—the restructuring of the electric utility industry. Second, the decision is inconsistent with the rulings of this Court, which establish that speech on public

issues, regardless of the identity of the speaker, must be permitted to proceed free of governmentally imposed burdens, such as requirements that a government message be included with a private one or that a private message be "corrected" or modified in accordance with government directives. *See, e.g., Greater New Orleans Broad. Ass'n, Inc. v. United States*, 119 S. Ct. 1923 (1999); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Pacific Gas & Electric Co. v. Public Utils. Comm'n of California*, 475 U.S. 1 (1986); and *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980). Third, the imminence of the changes in the electric utility industry, and the important consumer decisions that those changes will require, militate strongly in favor of review now, without delay for further administrative action or "percolation" in the lower courts.

The Supreme Judicial Court of Maine (the "Maine Court") incorrectly upheld Sections 6(C) and 7 of the Rules of the Maine Public Utilities Commission ("PUC").[2] The Rules permit the PUC to restrict and "correct" utilities' educational speech to consumers regarding the restructuring of the electric industry. The Rules also permit the PUC to insist that CMP and other Maine utilities disseminate the speech of the PUC.

The Maine Court appropriately recognized that the restricted speech at issue is non-commercial core speech, which should be accorded the fullest constitutional protection. Accordingly, the Court concluded that, to survive First Amendment scrutiny, the Rules need to serve a compelling state interest and must be "narrowly tailored" to achieve the state's legitimate goals. Pet. App. 17. Despite the high degree of protection accorded to the speech

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2 *Public Utilities Commission, Rulemaking: Consumer Education Program (Chapter 302)*, Docket No. 97-583 (Me. P.U.C. Nov. 3, 1997), reproduced in Pet. App. 25-35.

at issue, however, the Maine Court upheld the challenged Rules. *Id.* at 19. CMP now seeks review of that decision, on the dual grounds that the interests asserted by the PUC (*i.e.*, avoiding consumer confusion and ensuring that consumers receive accurate information) are not sufficiently compelling and that, in any event, the PUC's regulations are not narrowly tailored to achieve the state's goals, even if those goals are legitimate.

The opinion below directly conflicts with decisions of this Court and other federal courts regarding protected speech in the highly-regulated electric industry as well as in other industries. These decisions demonstrate that, although the government is permitted to regulate these industries, regulatory agencies are still prohibited from restricting or controlling non-deceptive speech.[3]

It is important that the Court hear this case now, because this is a critical time in the electric power industry restructuring process. Many states are currently undergoing, or are planning to undergo, restructuring, and are developing rules for this transition. In addition, consumers are beginning to make decisions regarding which electricity supplier to choose.[4] To make a reasoned decision, they will need economic and practical information regarding that choice, such as the cost of the service, the

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[3] *See, e.g., Greater New Orleans Broad. Ass'n, Inc. v. United States*, 119 S. Ct. 1923 (1999); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Pacific Gas & Electric Co. v. Public Utils. Comm'n of California*, 475 U.S. 1 (1986); *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980); *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999); *Washington Legal Found. v. Henney*, 56 F. Supp. 2d 81 (D.D.C. 1999); *Western States Med. Ctr. Pharmacy v. Shalala*, 1999 WL 965444 (D. Nev. Sept. 16, 1999); *Knoll Pharmaceutical Co. v. Sherman*, 57 F. Supp. 2d 615 (N.D. Ill. 1999); and *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998).

[4] CMP will not be a "supplier" of electricity, but only a provider of transmission services. *See* 35-A M.R.S.A. 3204(5), (6).

billing process, the reliability of each supplier, and the methods by which they can switch suppliers.[5] Thus, it is imperative that electric utilities nationwide be permitted to provide consumers now with the broadest range of educational information about restructuring, without being hindered from doing so by state regulations that improperly restrict their speech.

Furthermore, Maine's Rules could have broad national impact, because the electricity restructuring plan adopted in Maine can be expected to be considered and possibly used as a template by many other states as they restructure and develop rules to govern the newly competitive electricity industry. Thus, the Rules can be expected, directly or indirectly, to have a chilling effect on many utilities' speech. Consumers will not receive on a timely basis all the information they want and need to reach an educated decision about their choice of electricity supply. Consumers and the free marketplace ultimately will suffer substantial injury from rules that substantially hamper or prevent the fullest dissemination of accurate information. Finally, not only is this case important in the context of the restructuring of the electric power industry, but it is likely that the decision below, if permitted to stand, will have significant implications generally for protected speech in other industries, especially those that are highly regulated.

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[5] Some states have required that a consumer make an affirmative decision even to keep his or her current provider; other states, such as Maine, preclude consumers from choosing a certain provider once that provider serves a particular percentage of the state's consumers. *See* 35-A M.R.S.A. § 3205(2)(B). Even in states where consumers are permitted to switch providers after the restructuring process has gotten underway, such changes are not cost-free; at a minimum, they entail some inconvenience, and out-of-pocket financial costs also may be required.

CERTIORARI SHOULD BE GRANTED TO ESTABLISH THAT, UNDER THE FIRST AMENDMENT, THE PUC CANNOT CONTROL OR ADD TO THE CONTENT OF A UTILITY'S EDUCATIONAL MATERIALS.

A. The Maine Court Incorrectly Decided an Important First Amendment Question, Burdening Petitioner's Core Speech.

The Maine Court correctly determined that the speech at issue is fully protected "core speech" because it involves educational information about a matter of public concern. The court stated, "Speech involving purely factual material of public interest is fully protected by the First Amendment, even if the subject of the speech is a commercial matter." Pet. App. 9. *See also id.* at 8-9, *citing Mills v. Alabama*, 384 U.S. 214, 218-19 (1966), and *Thornhill v. Alabama*, 310 U.S. 88, 95, 101-102 (1940) (core speech involves speech directed at public education or matters of public concern). Nevertheless, the Maine Court upheld the PUC's restrictions on the speech of CMP and other Maine utilities. This was error.

The Maine Rules improperly burden speech because they discriminate against one particular type of speaker, namely, "electric and transmission and distribution utilities." Pet. App. 32. The Rules require that speakers of this kind bear a heavier burden than any other speakers who might choose to comment on the restructuring of the electric utility industry, including actual participants in the market.[6] Specifically, the Rules require that the covered utilities do either or both of two things: (1) include the PUC's own educational materials in the utilities' billing envelopes; and (2) disseminate revised versions of their informational mailings to accommodate the PUC's re-

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[6] CMP will not directly compete for customers in the retail market. *See* 35-A M.R.S.A. § 3204(5), (6).

quired modifications.[7] These requirements impose significant burdens that go far beyond any burden that the average speaker would be required to bear. Because the state's purported justification for its Rules does not satisfy either the "compelling state interest" or the "narrow tailoring" requirement, the Rules cannot survive First Amendment scrutiny.

The PUC's asserted interest in avoiding "consumer confusion" and ensuring that consumers are provided with accurate information about the restructuring of the electric utility industry is not the sort of governmental interest that this Court has characterized as "compelling" in prior cases. *Contrast, e.g., Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (state regulation shielding children from indecent broadcast messages was valid because "there is a compelling interest in protecting the physical and psychological well-being of minors"); *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 743 (1996) (governmental interest in protecting children from exposure to patently offensive sex-related material is compelling justification for restriction of speech); *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 9-16 (1988) (state has "compelling interest" in "combatting invidious discrimination").

Moreover, even if the PUC's asserted interest were thought to warrant the "compelling" label, the PUC's rules are far more restrictive than required to serve that interest, and any legitimate governmental objective could be achieved at least as effectively through less restrictive means. Simply stated, the PUC can communicate directly with the public and can accomplish its educational goals in that manner. It is clearly unnecessary for the PUC to

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[7] Pet. App. 32-33. The Rules allow the PUC to decide whether the utility's speech is deceptive or misleading by a brief investigation and hearing, giving the PUC full discretion to determine what is misleading, inaccurate, or deceptive. *Id.*

use the utility's mailings to communicate information from the PUC. The PUC can achieve that end directly, by providing educational information in separate mailings, by giving customers access to the PUC's information via the Internet, by distributing information in newspapers or brochures, by broadcasting information in television or print advertisements, or by providing consumers with additional services, such as a hotline, to educate them about restructuring. The PUC's Rules therefore are not "narrowly tailored" to serve legitimate governmental purposes and are not the least restrictive means toward that end. Rather, the Rules are designed, as even the court below acknowledged, to ensure that consumers receive only the information that the PUC wants to give them and no more. As such, the Rules impermissibly burden the speech of CMP and other Maine utilities.

B. The Opinion Below Conflicts With Earlier Decisions of This Court.

The Maine Court's decision is inconsistent with precedent from this Court regarding the First Amendment protection afforded speech, even in regulated industries. Moreover, even in highly regulated areas, where extensive governmental involvement is a given, the Court has made it clear that the First Amendment protects educational speech from attempts by regulatory agencies to control that speech.

For example, this Court concluded that the First Amendment was violated in another situation in which a utility was required to include third-party materials in its mailings. *See Pacific Gas*, 475 U.S. 1. As CMP has explained at length in its petition, the *Pacific Gas* case is instructive because it struck down a state public utility commission requirement that a utility place materials from a third party in its mailings. This Court held that, by requiring the utility to include an advocacy group's news-

letter in the utility's mailings, the California commission violated the utility's First Amendment rights because it forced the utility to associate with the views of that group. *Id.* at 20-21. A plurality of the Court observed that the utility might well choose not to send out any textual materials at all with its mailings, to avoid the possibility that it would be forced to disseminate hostile views along with its own materials. *Id.* at 14. The plurality explained that, by thus discouraging the utility's speech, the commission's order would inhibit the free flow of information that the First Amendment seeks to promote. *Id.* Similarly, the Maine Rules can be expected to chill utilities' speech, because utilities might well decide not to send out any information at all, to avoid the possibility that they would be forced later to change their statements or to send out different—and perhaps inconsistent—statements sponsored by the PUC. This is precisely the sort of disincentive to speech that cannot be reconciled with the First Amendment. By discouraging utilities from speaking about industry restructuring, the Maine Rules can be expected to reduce the amount of information provided to consumers, an outcome antithetical to the First Amendment. *See also Central Illinois Light Co. v. Citizens Util. Bd.*, 827 F.2d 1169 (7th Cir. 1987); *In re Open Network Architecture*, 145 P.U.R.4th 450 (Or. P.U.C. 1993).

Even if the Maine Rules were to be reviewed not under the strict scrutiny standard but under the less-demanding intermediate scrutiny that this Court has applied to commercial speech, they still would not satisfy the First Amendment. Under the lesser commercial speech standard, such governmental restrictions can only be upheld if: (1) the government's interest in regulating the speech is substantial; (2) the restrictions advance the government's interest in a direct and material way; and (3) the restrictions do not burden substantially more speech than

necessary. *Central Hudson*, 447 U.S. at 566 (setting forth the analytical standards for restrictions on commercial speech).

In a recent case involving casino gambling, another highly-regulated industry, the Court held that state restrictions on private casino speech were overly stringent, because the regulations did not directly advance the asserted governmental interest and burdened speech more extensively than necessary. *New Orleans*, 119 S. Ct. at 1935. The Court determined that the government's interest in ameliorating the social costs of gambling was not sufficient to support the regulations restricting free speech, because the government placed these regulations on private casino gambling but not on other classes of casinos (such as tribal, government-operated, nonprofit, and "occasional and ancillary" commercial casinos). *Id.* at 1933. In addition, the Court struck down the regulations on the ground that the government should have considered less burdensome alternatives for achieving its legitimate ends, rather than electing to restrict the flow of information to consumers. *Id.* The Court reached a similar conclusion in a case involving the regulated alcoholic beverage industry. *Coors*, 514 U.S. 476. There, the Court determined that the government's restriction on breweries, prohibiting them from putting the percentage of alcohol in their labels, was overly restrictive because it did not directly advance the government's aims of protecting the health, safety, and welfare of its citizens, and because there were other regulatory options that could have advanced the government's interests in a less intrusive manner. *Id.* at 490-91.

The same is true of the Maine Rule at issue here. For the reasons summarized above, they do not materially advance a substantial governmental interest, and in any event they are significantly more restrictive than is neces-

sary to accomplish the PUC's objectives. If the PUC is concerned about any potential error in statements by regulated utilities, it can correct any such error through its own speech. Likewise, if the PUC wishes to disseminate its own speech to consumers, it can do so directly rather than requiring CMP or other utilities to do so for it. Moreover, as in the *New Orleans* case, the PUC is seeking to restrict and control the speech of only one class of speaker —regulated utilities; it does not, and cannot, impose the same requirements on any other speakers (including the very companies that will compete in the production and sale of electricity).

In both *New Orleans* and *Coors,* the Court concluded that, despite the existence of a substantial governmental interest in protecting the welfare of the populace in relation to activities of the industries at issue, governmental restrictions suppressing speech are not favored. *See New Orleans,* 119 S. Ct. at 1135-36 ("[The Government] cannot overcome the presumption that the speaker and the audience, not the Government, should be left to assess the value of accurate and nonmisleading information about lawful conduct."); *Coors,* 514 U.S. at 484 (federal alcohol policy generally favors greater disclosure of information, rather than less). By analogy here, the speaker (the utility) and the audience (consumers) should be entitled to present, hear, and assess information about restructuring for themselves.

C. The Effects of the Maine Court's Decision Will Be Wide-Reaching and Have National Impact.

1. *The Restriction of Utility Speech Will Have Nationwide Effects on the Electricity Restructuring Process.*

Utilities should be permitted to proceed unimpeded in providing important educational information to consumers during the critical industry restructuring process. By per-

mitting state regulators to "correct" and control utility speech, the Maine Rules not only would substantially restrict or preclude a utility's ability to disseminate such educational materials, but they also would support and encourage decisions in other states to similarly hinder or prevent consumers from receiving educational materials regarding restructuring from their utilities. This case thus will have national impact, because the Maine Court's decision reasonably can be expected to be considered and possibly followed in those states that have not yet implemented electric restructuring programs.

Electric industry restructuring means that traditional electric utilities will cease to exist as they have been traditionally structured or will no longer be the sole suppliers in their service territories.[8] Twenty-three states already have reached some final legislative or regulatory decision that would eliminate or dramatically alter the existing local franchise rights and protections regarding many traditional utility services. Congress also has initiated a significant degree of reform at the federal, wholesale level and is considering additional reforms in the electric industry.[9] Utility delivery services will continue to be regulated, but providers will now face competition from unregulated market participants in the sale of electricity.

Restructuring of retail sales of electricity represents an immense nationwide change in the way electricity will be marketed to households and businesses. Without question, the regulations that state legislatures and state utility commissions are and will be implementing that affect utilities' speech rights will have a substantial impact on the ultimate success of restructuring, because they will deter-

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[8] *See Consumers' "Right to Know" Will Advance Electric Competition*, NARUC Issue Brief.

[9] *See* Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776.

mine the scope and quality of information that consumers receive regarding the changes in the electricity industry.

EEI has long been following this state activity regarding the restructuring of the electric utility industry. There are several themes that have been addressed similarly by most of the states that have acted so far.[10] This similar treatment is facilitated by the information-sharing programs provided, and positions advocated, by national organizations such as the National Association of Regulatory Utility Commissioners ("NARUC"),[11] the New England Conference of Public Utility Commissions ("NECPUC"), and the National Association of Attorneys General ("NAAG").[12] These groups regularly discuss relevant issues, share information about developments in the states, and develop models for use in restructuring proceedings. For example, NECPUC has developed a model rule for disclosing standardized information to consumers in the New England region.[13] In addition,

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[10] For instance, states have handled similarly issues such as codes of conduct for affiliate transactions and how to educate consumers about these changes and the realities of the new competitive market for electric services.

[11] *See* http://www.naruc.org. NARUC has also developed positions on the proper ways to provide consumers with information. *See Consumers' "Right to Know" Will Advance Electric Competition*, NARUC Issue Brief.

[12] NAAG is in the process of developing guidelines for utilities' use in electricity advertising. *See Environmental Marketing Guidelines for Electricity*, prepared by the Environmental Marketing Subcommittee of the National Association of Attorneys General's Energy Deregulation Working Group, May 24, 1999.

[13] *See New England Model Disclosure Rule*, The Regulatory Assistance Project Issuesletter, May 1998, and *New England Conference of Public Utilities Commissioners Model Rule on Information Disclosure*, May, 1998. The NECPUC Commissioners stated that a uniform regional disclosure policy is in the public interest because consumers will be able to compare more easily suppliers' offers and make more informed decisions, and uniformity will help

NARUC recently initiated a process to develop uniform codes of conduct that will govern utilities' relationships with their affiliates and unregulated divisions, and it just finalized guidelines for utilities' cost allocation and pricing methods. *See NARUC Starts Developing Conduct Codes for Affiliate Relationships*, Electric Utility Week, Nov. 15, 1999.

All twenty-three states that have begun the process of industry restructuring have addressed or are currently considering the issue of consumer education. This Court should address the issue presented in the petition now, to avoid an unnecessary "chilling effect" on the ability of utilities to provide consumers with truthful, non-deceptive educational information regarding restructuring. Such information is important to consumers in their efforts to understand the complexity of restructuring and to make informed decisions about which electric power supplier to choose. EEI has conducted studies on the effects that information has on consumers' decision-making process and has found that in states where consumers are given more information, such as through utility educational campaigns, the state's residents have a higher level of awareness about choice and competition.[14]

Consumers will have general questions such as what companies will be selling electricity, why there is a differ-

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suppliers avoid having to comply with a variety of state requirements, in turn reducing the cost of electricity to consumers. *See also Information Disclosure for Effective Customer Choice*, The Regulatory Assistance Project Issuesletter, Oct. 1996.

[14] *See, e.g., Electric Deregulation: Pennsylvania-California Results Comparison*, Edison Electric Institute, Nov. 1999, demonstrating that in Pennsylvania, where there was a much broader public awareness campaign than in California, consumers were more aware of their opportunity to choose an electric supplier and more likely to say that the introduction of new products and services had improved because of restructuring. *Id.*

ence between electric providers and the utility that will deliver the electricity, how to determine whether various providers are reliable, how companies will handle power outages and other emergency situations, how the power will get to them, what new services might be offered, what different combinations of services may be available, and how and when they must choose a provider. In addition, consumers will need economic and practical information such as who will send them their bill, what their bill will look like, how much the electricity will cost, and how their power supplier will handle non-payment issues.[15]

It is crucial that consumers receive this information now, because the advent of restructuring requires that consumers make a choice regarding an electricity provider in the near future. If they are not given this information before the start of competition, the consequences could be significant. For instance, in some states, if consumers do not choose a provider, they are assigned a provider by the state utility commission. In other states, consumers may be precluded from choosing a certain provider if they do not choose early enough. 35-A M.R.S.A. § 3205(2)(B). Even if consumers are permitted to switch providers, however, the process of switching could cost the consumer substantial time, aggravation, and money.

Consumers can make educated decisions only if they are given access to complete and balanced information. If consumers are deprived of information, or are confused or misled as to its source, the injury to consumers can be expected to be substantial, as evidenced by restructuring

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[15] *See* Charles J. Ogletree, Jr. et al, *Constitutional Grounds to Challenge State Public Utility Commission Restrictions on Affiliate Use of Utility Name and Logo* (Edison Electric Institute Monograph, Oct. 1999), discussing EEI consumer survey results that showed that consumers want more information rather than less.

in other industries,[16] as well as by the size of the electric power industry and its central importance in consumer purchasing decisions. Suppression, restriction, alteration, or modification of utilities' speech about restructuring by state regulators following Maine's lead thus can be expected to interfere with consumer choice at a key point of restructuring, substantially harming both consumer understanding and the success of restructuring.

2. *The Maine Court's Decision Also Has Implications for the Protection of Speech in Other Highly Regulated Industries.*

In another industry that is analogous to the electric power industry in scope and degree of regulation, the food and drug area, several lower federal courts recently have held that prohibitions on commercial speech were unconstitutional. In both the food and drug area and the electricity area, information is a valuable commodity that should not be withheld by the government for protectionist or paternalistic reasons. The food and drug First Amendment cases are quite analogous to the case at hand because they all involve governmental suppression of information, in an industry where information is of utmost importance to consumer welfare.

The courts have reinforced the importance of information to consumers in the heavily regulated food and drug area by determining that, despite the government's substantial interest in protecting consumers from confusing or misleading information, the consumers' right to hear the information should prevail. *See, e.g., Pearson*, 164 F.3d at 659 (government's interest in avoiding custo-

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16 Restructuring of the telecommunications industry has resulted in considerable consumer confusion and consumer dissatisfaction. *See, e.g., This Year Don't Be April-Foolish; Join BellSouth to Take Aim Against Consumer Fraud*, PR Newswire, April 1, 1999.

mer confusion did not justify the government's restriction on speech); *Knoll*, 57 F. Supp. 2d at 622. The courts have consistently held in the context of this highly-regulated area that the preferred remedy for potentially misleading speech is more disclosure rather than less. *See WLF*, 56 F. Supp. 2d at 85 (governmental restrictions on speech unconstitutional because restrictions based on the view that speech *might* be misleading not warranted; for governmental restrictions to outweigh the speaker's First Amendment rights, the government had to show that "the restricted speech, by nature, is more likely to mislead than to inform.").[17] *See also Pearson*, 164 F.3d at 657; *Western States*, 1999 WL 965444 at *16.

In addition, the recent food and drug decisions demonstrate that the Constitution requires the government to consider less restrictive, more narrowly tailored restrictions that do not suppress speech, even in highly-regulated arenas where consumers may need additional protection because their health, safety, or welfare is involved. *See Western States*, 1999 WL 965444 at *17 (portion of the Food and Drug Administration Modernization Act of 1997 unconstitutional because Congress could have found a more direct route to achieve its stated goal of protecting public health than "traveling through the protected area of speech"); *see also Knoll*, 57 F. Supp. 2d 615; *WLF*, 56 F. Supp. 2d 81; *Pearson*, 164 F.3d 650; *Western States*, 1999 WL 965444.

These cases support the conclusion that the Maine PUC's asserted interest of protecting consumer welfare should not override consumers' rights to receive information. Rather, the PUC should be directed to find a less

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[17] The regulations at issue in *WLF* were strikingly similar to the Maine Rules in that they authorized the FDA to correct or amend truthful, nonmisleading speech disseminated by FDA-regulated companies.

burdensome way to regulate than altering CMP's speech or forcing CMP to distribute the PUC's speech. As in the food and drug area, information is of great importance to electricity consumers and the industry, and disclosure should be favored over suppression. Consumers need to receive educational information about electric restructuring from diverse sources, including current electric power suppliers who will no longer be direct competitors in the new market.

Moreover, it is important that the PUC not be permitted to decide the propriety of truthful information—consumers should be allowed to hear this information and decide its value for themselves. *See Knoll*, 57 F. Supp. 2d at 622 ("truthful advertising about a lawful activity may not be suppressed based only on speculation concerning the effect that truthful information might have on the public"). The Maine Rules permit the PUC to monitor, restrict, and correct the utility's speech if, after a "summary investigation" and a public hearing, the PUC finds the speech to be "misleading, deceptive or inaccurate," with no limitation on the interpretation of those terms. Pet. App. 33. In addition, the Rules permit the PUC to require that utilities disseminate the PUC's "corrections." *Id.* Thus, the PUC is the ultimate arbiter of what may be considered to be accurate statements about important matters of public interest—a role not appropriate for a regulator or any other governmental body under the First Amendment. The PUC may determine that a utility's information is misleading, not because the utility's information is inherently inaccurate, but simply because the PUC's opinion differs from the utility's opinion on a matter of public concern. The PUC's regulations thus entail a significant probability that a utility's legitimate speech will be restricted or suppressed through government "correction," alteration, or forced supplementation.

The food and drug First Amendment cases demonstrate that even the government's interest in protecting the safety and health of its citizens does not override the importance to individuals of receiving valuable information. Likewise, the PUC's interest in protecting Maine citizens from confusing or potentially misleading economic information does not override the importance to individuals of receiving information about restructuring. Moreover, given that the food and drug cases involved restrictions on commercial speech, which are accorded a lesser degree of scrutiny than CMP's core speech, it is clear that the PUC's restriction of CMP's speech also should be held unconstitutional. Under this Court's precedent, as well as under lower court opinions addressing the suppression or hindering of speech in similar regulated contexts, the Maine Rules do not withstand scrutiny.

This Court should grant review now so that utilities in the electricity indutry, as well as companies in other regulated industries, will be fully protected under the First Amendment, and so that consumers can be provided with much-needed and much-desired educational information about restructuring from all sources, including their current electric power providers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD H. COMER
LAURENCE W. BROWN
EDISON ELECTRIC INSTITUTE
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 508-5000

PETER BUSCEMI *
CASWELL O. HOBBS, III
STEPHEN PAUL MAHINKA
KATHLEEN M. SANZO
SANDRA J.P. DENNIS
JULIE E. KOCH
MORGAN, LEWIS &
BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190
* *Counsel of Record*

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